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In the Supreme Court of the United States

OCTOBER TERM, 1988

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE
SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND NATIONAL TREASURY EMPLOYEES UNION

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, which governs labor relations between federal agencies and their employees, requires an agency to negotiate over a union proposal that, if incorporated into the collective bargaining agreement, would subject the agency's contracting-out determinations made pursuant to OMB Circular No. A-76 to grievance and arbitration.

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**PETITION FOR A WRIT OF CERTIORARI
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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The Acting Solicitor General, on behalf of the Internal Revenue Service of the Department of the Treasury, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-9a) is reported at 862 F.2d 880. The decision of the Federal Labor Relations Authority (App., *infra*, 10a-18a) is reported at 27 F.L.R.A. 976.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 19a-20a) was entered on December 2, 1988. A petition for

rehearing was denied on February 28, 1989 (App., *infra*, 21a). On May 22, 1989, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. 7103(a) provides in relevant part:

(9) "grievance" means any complaint —

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning —

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment[.]

5 U.S.C. 7106 provides in relevant part:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency —

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws —

(A) to hire, assign, direct, layoff, and retain employees in the agency, * * *;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments * * *

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating —

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

Subject to paragraph (2) of this subsection [relating to agency-specific regulations], the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

5 U.S.C. 7121 provides in relevant part:

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedure shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall —

- (1) be fair and simple,
- (2) provide for expeditious processing, and
- (3) included procedures that —

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

STATEMENT

A. Background

1. The Federal Labor Management Relations Scheme

Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, provides a "comprehensive * * * scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 91 (1983). As part of this scheme, the statute expressly recognizes the right of federal employees to form and join unions (see, e.g., 5 U.S.C. 7102), and imposes upon management officials of federal agencies a duty to bargain with their employees' unions regarding conditions of employment. See *FLRA v. Aberdeen Proving Ground, Department of the Army*, 108 S. Ct. 1261 (1988); *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. at 92; 5 U.S.C. 7103(a)(12), 7114, 7116(a)(5), 7117. "[C]onditions of employment" include "personnel policies, practices, and matters * * * affecting working conditions" (5 U.S.C. 7103(a)(14)).

a. *The Management Rights Provision.* "Recognizing 'the special requirements and needs of the Government,' § 7101(b), Title VII exempts certain matters from the duty to negotiate." *FLRA v. Aberdeen Proving Ground*, 108 S. Ct. at 1261. In particular, 5 U.S.C. 7106 provides that "nothing in this chapter shall affect the authority of any management official of any agency" with respect to certain enumerated "management rights."¹ The reserved manage-

¹ The authority reserved to management in 5 U.S.C. 7106(a) is "[s]ubject to subsection (b) of this section." Section 7106(b) specifies that the management rights provision does not "preclude any agency and any labor organization from negotiating" with regard to the "procedures which management officials of the agency will observe in exercising any authority under this section" and with regard to "appropriate arrangements for employees adversely affected by the

ment rights listed in Section 7106 specifically include management's "authority * * * in accordance with applicable laws * * * to make determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)).²

b. *Negotiability Disputes.* The statute provides a mechanism for resolving negotiability disputes. If management officials decline to negotiate over a union's proposal on the ground that they have no duty to do so, the union may file a negotiability appeal with the Federal Labor Relations Authority. See 5 U.S.C. 7105(2)(E), 7117(c). The FLRA then decides whether or not the union's proposal is subject to the bargaining obligation. 5 U.S.C. 7117(c)(6); see *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. at 93. The FLRA's rulings on negotiability are reviewable in the courts of appeals. See 5 U.S.C. 7123.

The FLRA's decision that a particular proposal is negotiable does more than simply require the parties to bargain in good faith. In contrast to the National Labor Relations Act, collective bargaining under Title VII of the Civil Service Reform Act may result in a third party requiring an agency to adopt a proposal that it finds unacceptable. Specifically, if negotiation eventually reaches an impasse, "either party may request the Federal Service Impasses Panel to consider the matter." 5 U.S.C. 7119(b)(1). The Panel may resolve the dispute by ordering the incorporation of the contested proposal in the collec-

exercise of any authority under this section by such management officials."

² In addition, Title VII precludes an agency from bargaining over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation," and over "matters which are the subject of * * * a Government-wide rule or regulation" (5 U.S.C. 7117(a)(1)).

tive bargaining agreement (5 U.S.C. 7119(c)(5)(B)(iii)). See *National Federation of Federal Employees v. FLRA*, 789 F.2d 944, 945 (D.C. Cir. 1986). Thus the effect of an FLRA finding of negotiability is that the proposal may ultimately be imposed on the parties by the Federal Service Impasses Panel. See, e.g., *Indiana Air National Guard v. FLRA*, 712 F.2d 1187, 1189 n.1 (7th Cir. 1983).

c. *Grievance Procedures.* In addition to setting forth a duty to bargain, the statute commands that all collective bargaining agreements in the federal sector "shall provide procedures for the settlement of grievances" (5 U.S.C. 7121(a)(1)). With certain exceptions not pertinent here, these negotiated grievance procedures "shall be the exclusive procedures for resolving grievances" (*ibid.*). Collective bargaining agreements must "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the [union] or the agency" (5 U.S.C. 7121(b)(3)(C)).

"Grievances" are defined in 5 U.S.C. 7103(a)(9) to mean complaints by employees and unions "concerning any matter relating to the employment" of an employee (5 U.S.C. 7103(a)(9)(A) and (B)), complaints concerning the effect, interpretation, or alleged breach of the collective bargaining agreement (5 U.S.C. 7103(a)(9)(C)(i)), and "any complaint by any employee, labor organization, or agency concerning any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" (5 U.S.C. 7103(a)(9)(C)(ii)).

2. OMB Circular No. A-76

Office of Management and Budget Circular No. A-76 "establishes Federal policy regarding * * * whether commercial activities should be performed under contract with

commercial sources or in-house using Government facilities and personnel." Circular, para. 1.³

The Circular provides that the heads of Executive Branch agencies are to "evaluate all agency activities and functions to determine which are Government functions * * * and which are commercial activities." Circular Supplement at I-1.⁴ With respect to those activities found to be commercial, the Circular provides guidelines for conducting a cost comparison to determine whether it would be cheaper to perform the activity in-house or to contract out the activity to the private sector. *Id.*, Pt. IV. With certain exceptions, in-house performance of a commercial activity is sanctioned only if the in-house cost is less than the cost of contracting out to the private sector. Circular, para 8.d.

In order "to provide an administrative safeguard to ensure that agency decisions are fair and equitable and in accordance with [applicable] procedures," the Circular obliges each covered agency to establish an administrative appeals procedure to resolve complaints by employees,

³ The policy now embodied in the Circular was formerly promulgated through Bureau of the Budget bulletins issued in 1955, 1957 and 1960. Circular, para. 4.b. The Circular was first issued in 1966, and was revised in 1967, 1979, and 1983. It was amended in certain respects not pertinent to this case in 1985. See Circular, para. 4.b; 50 Fed. Reg. 32,812 (1985); 48 Fed. Reg. 37,110 (1983); 44 Fed. Reg. 20,556 (1979). The Circular, which is accompanied by a Supplement that sets forth the steps to be taken by agency officials to implement the Circular's general policy, is signed by the Director of OMB and is addressed to the heads of Executive Branch agencies.

⁴ "A governmental function is a function which is so intimately related to the public interest as to mandate performance by Government employees," while a commercial activity is "one which is operated by a Federal executive agency and which provides a product or service which could be obtained from a commercial source." Circular, para. 6.a and e.

unions, or bidders directly affected by its decisions. Circular Supplement at I-14; see Circular, para. 6.g. Complaints must ordinarily be filed within 15 working days of the receipt of the cost data on which the agency's decision is based, and appeals must be resolved within 30 calendar days of filing. Circular Supplement at I-14, I-15. "The original appeal decision shall be final unless the agency procedures provide for further discretionary review within the agency." *Id.* at I-14.

The Circular states that it does not "[e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular, except as specifically set forth in" the administrative appeal process described in the Circular itself. Circular, para. 7.c(8). The Circular states that the required internal appeal procedure "does not authorize an appeal outside the agency or a judicial review" (Circular Supplement at I-14), and that "the procedure and the decision upon appeal may not be subject to negotiation, arbitration, or agreement" (*id.* at I-15).

3. The EEOC Litigation

In *AFGE, National Council of EEOC Locals and EEOC*, 10 F.L.R.A. 3 (1982), the FLRA held that a union proposal requiring EEOC to comply with OMB Circular No. A-76 was subject to the statutory bargaining obligation. The FLRA rejected the agency's argument that negotiation over the union proposal would improperly impinge upon the authority "to make determinations with respect to contracting out," an authority specifically reserved to management by 5 U.S.C. 7106(a)(2)(B). The FLRA stated that the union proposal "would contractually recognize external limitations on management's right" but

concluded that the proposal would nevertheless not contravene Section 7106(a)(2)(B) because it "would not establish, either expressly or by incorporation, any particular substantive limitations on management." 10 F.L.R.A. at 3. Furthermore, according to the FLRA, the union's bargaining proposal was essentially superfluous, since "even in the absence of the contract provision proposed by the Union, disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure" (*id.* at 5).⁵ A divided panel of the United States Court of Appeals for the District of Columbia Circuit upheld the FLRA's ruling. *EEOC v. FLRA*, 744 F.2d 842 (1984) (*EEOC CA*).

The EEOC sought review in this Court of the court of appeals' decision. The agency argued that the court of appeals erred in concluding that the union proposal was negotiable despite the management rights provision that nothing in Title VII is to "affect the authority" of an agency to make contracting-out determinations "in accordance with applicable laws" (5 U.S.C. 7106(a)). In particular, the agency challenged the court's conclusion that the proposal "recognized only existing limitations on EEOC's power" (*EEOC CA*, 744 F.2d at 846) and argued that this conclusion was based on the erroneous assumption that the Circular is an "applicable law[]" within the meaning of Section 7106(a)(2). The agency also challenged the lower court's conclusion that the proposal did not "affect the authority" of EEOC to make contracting-out decisions

⁵ The FLRA thus rejected management's claim that negotiation over the union's proposal was barred because such negotiation "would conflict with OMB Circular No. A-76 itself" (10 F.L.R.A. at 4). The FLRA stated that the Circular cannot "limit the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure," (*ibid.*).

because such decisions would be subject to the negotiated grievance procedures required by Title VII in any event. The agency argued in this Court that the statutory grievance definition (5 U.S.C. 7103(a)(9)(C)(ii)) on which the court of appeals apparently relied does not cover challenges to contracting-out decisions made pursuant to the Circular because the Circular is not a "law, rule, or regulation" within the meaning of that definition.⁶

This Court granted the agency's petition for a writ of certiorari (472 U.S. 1026 (1985)). After briefing and argument, however, the writ was dismissed as improvidently granted, on the ground that the agency's arguments had not been adequately raised before or addressed by either the court of appeals or the FLRA, and thus were not properly before this Court. *EEOC v. FLRA*, 476 U.S. 19 (1986) (*EEOC SC*).⁷

B. Proceedings in the Present Case

1. The FLRA's Decision

During negotiations with the agency, a union representing employees of the Internal Revenue Service of the Department of the Treasury submitted the following bargaining proposal: "The Internal Appeals Procedure [for

⁶ The agency also argued that the union proposal was non-negotiable by virtue of 5 U.S.C. 7117(a)(1) because Circular No. A-76 is a "Government-wide rule or regulation."

⁷ Justice White and Justice Stevens dissented from the Court's decision to dismiss the writ of certiorari as improvidently granted. *EEOC SC*, 476 U.S. at 25 (White, J., dissenting); *id.* at 25-27 (Stevens, J., dissenting). Justice Stevens stated (*id.* at 27):

On the merits, I am persuaded that Circular A-76 is not one of the "applicable laws" described in 5 U.S.C. § 7106(a)(2)(B) and that requiring compliance with the Circular would intrude on management's reserved rights. Accordingly, I would reverse the judgment of the Court of Appeals.

challenging determinations made pursuant to OMB Circular No. A-76] shall be the parties' grievance and arbitration provisions of the [applicable collective bargaining agreement]" (App., *infra*, 10a). The agency declined to bargain over the proposal, asserting that the proposal was exempt from the bargaining obligation by virtue of the management rights provision (5 U.S.C. 7106). The union brought a negotiability appeal before the FLRA, and the agency explicitly presented the arguments not considered in *EEOC CA*: that OMB Circular No. A-76 is neither an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2) nor a "law, rule, or regulation" under Section 7103(a)(9)(C)(ii).⁸ The FLRA ruled that the proposal was negotiable (App., *infra*, 10a-15a),⁹ and in doing so, it rejected the arguments presented to this Court in *EEOC SC*.¹⁰

2. The Court of Appeals' Decision

a. The agency filed a petition for review in the D.C. Circuit, again presenting the arguments that the proposal

⁸ The agency also argued that negotiation on the proposal was precluded by 5 U.S.C. 7117(a)(1).

⁹ The FLRA reaffirmed the position it took in *EEOC*, although it recognized (App., *infra*, 14a n.1) that the Ninth Circuit had since rejected that position in *Defense Language Institute v. FLRA*, 767 F.2d 1398 (1985), cert. dismissed, 476 U.S. 1110 (1986). In addition to its decision in *EEOC*, the FLRA also relied significantly on its decision in *AFGE, Local 1923 and Department of Health and Human Services, Office of the Secretary, Office of the General Counsel, Baltimore, Maryland*, 22 F.L.R.A. 1071 (1986), in which it had held negotiable a proposal similar to those at issue in *EEOC* and in the present case. That decision has since been set aside by the Fourth Circuit. *HHS v. FLRA*, 844 F.2d 1087 (1988) (en banc).

¹⁰ The FLRA also held negotiable a second proposal advanced by the union, which sought to require the agency to wait until all grievances concerning the impact and implementation of a contracting-out determination had been exhausted through the grievance and arbitration procedures before awarding any contract (App., *infra*, 16a-18a).

was exempt from the bargaining obligation and that OMB Circular No. A-76 is neither an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2) nor a "law, rule, or regulation affecting conditions of employment" under 5 U.S.C. 7103(a)(9)(C)(ii).¹¹

The panel, over a dissent by Judge D.H. Ginsburg, upheld the FLRA's ruling. App., *infra*, 1a-9a. The panel majority recognized that the agency had in this case explicitly urged the arguments not considered in *EEOC CA*. Although it noted that this Court had dismissed the writ of certiorari in *EEOC SC* as improvidently granted precisely because these arguments "had never [been] made before either the FLRA or this court" (*id.* at 5a), the panel majority nevertheless regarded itself as powerless to consider those arguments here because "[w]e do not * * * find an intellectually legitimate basis to distinguish *EEOC [CA]* from this case" (*ibid.*). The panel recognized that its own precedent, which it followed in this case, was in conflict with decisions of the Fourth and Ninth Circuit, both of which had expressly disagreed with the D.C. Circuit's decision in *EEOC CA* (*ibid.*).¹²

Judge Ginsburg dissented from the majority's conclusion that *EEOC CA* prevented the panel from considering arguments not raised in that case. App., *infra*, 8a-9a. On the merits he stated: "I am persuaded by Judge Wilkinson's detailed and thoughtful opinion for the court

¹¹ The agency also indicated that the proposal to expose management's contracting-out decisions to labor arbitration was inconsistent with the terms of the Circular, and since the Circular is a "Government-wide rule or regulation" within the meaning of Section 7117(a)(1), the proposal is for that reason alone exempt from the bargaining obligation. See Gov't Br. 27 n.20.

¹² The panel did consider and set aside the FLRA's ruling that the union's second proposal—relating to staying implementation of agency contracting out decisions (see note 10, *supra*)—was negotiable. App., *infra*, 6a-7a. The panel determined that this proposal "encroaches entirely too far upon management's authority to accomplish its agency's mission with dispatch" (*id.* at 6a).

in *Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (*en banc*), and would rule, consistent therewith, that the Circular is neither an 'applicable law' nor a 'law, rule, or regulation' and that [the union's] proposal to subject contracting-out decisions to grievance procedures is therefore non-negotiable." App., *infra*, 9a.¹³

b. The court of appeals denied the agency's petition for rehearing with suggestion for rehearing *en banc* (App., *infra*, 21a-25a). Judge Silberman issued a separate statement concurring in the denial of rehearing *en banc* in light of the then pending vacancies on the court (*id.* at 24a). Judge D.H. Ginsburg, joined by Judges Williams and Sentelle, also issued a separate statement concurring in the denial of rehearing *en banc*. Judge Ginsburg stated (*id.* at 25a):

I think it would be a poor use of our resources to rehear this matter *en banc*. Both the Fourth and the Ninth Circuits have decided, contrary to our panel, that OMB Circular A-76 is neither an "applicable law" under 5 U.S.C. § 7106(a)(2)(B) nor a "law, rule, or regulation" under 5 U.S.C. § 7103(a)(9)(C)(ii). *U.S. Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (*en banc*); *Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir. 1985). It is likely that the Supreme Court will want to resolve this question, since it indicated its willingness to decide the same issue when it granted *certiorari* * * * to review our decision in *EEOC v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984) even before there was a split in the circuits on this question. The Court vacated its grant of [certiorari], however, when

¹³ Judge Ginsburg agreed with the majority's conclusion that the union's second proposal was not negotiable. App., *infra*, 8a.

it determined that the issue was not properly before it. 476 U.S. 19 (1986).

In view of the Supreme Court's apparent interest in this issue, I do not conceive it to be a sensible allocation of our time to rehear this case *en banc*.

REASONS FOR GRANTING THE PETITION

This case presents a conflict in the circuits with respect to a question of considerable importance to the government: whether the federal labor relations statute requires agencies to negotiate with unions over bargaining proposals which, if incorporated into collective bargaining agreements, would subject agency contracting-out decisions made pursuant to OMB Circular No. A-76 to grievance and arbitration, and hence to extra-agency oversight by labor arbitrators. More generally, the rationale of the decision below threatens to interfere significantly with the President's ability to manage the Executive Branch through written policy directives.

Even before there was a conflict in the circuits, this Court granted *certiorari* on the same question as that presented here when it agreed to review *EEOC CA*. The Court ultimately dismissed the writ of *certiorari* in that case as improvidently granted on the ground that the central issues had not been raised below. In this case, however, those issues have been properly raised. Accordingly, this case presents a suitable vehicle for this Court to address and resolve them.

1. The court below held that agencies must negotiate over proposals that would subject their contracting-out determinations to the grievance and arbitration machinery in their collective bargaining agreements. That holding, as the court expressly acknowledged (App., *infra*, 6a), is in conflict with decisions of both the Fourth Circuit and the

Ninth Circuit. See also *id.* at 9a (D.H. Ginsburg, J., concurring and dissenting); *id.* at 25a (D.H. Ginsburg, J., concurring in the denial of rehearing en banc); *HHS v. FLRA*, 844 F.2d at 1103 (Murnaghan, J., dissenting) (noting conflict); *Defense Language Institute v. FLRA*, 767 F.2d at 1400 n.4 (same).

In *Defense Language Institute v. FLRA*, 767 F.2d 1398 (1985), cert. dismissed, 476 U.S. 1110 (1986), the Ninth Circuit held that a proposal to subject an agency's contracting-out determinations under OMB Circular No. A-76 to arbitral review is exempt from the duty to bargain. The Ninth Circuit reasoned that, because management's application of the Circular in reaching such decisions necessarily entails a large measure of judgment and discretion, "[adoption of the union's proposal] will result in arbitral review in which the arbitrator can substitute his judgment for that of the agency" (767 F.2d at 1401). Accordingly, the court found that "the union's proposal violates rights reserved to management under section 7106(a)" (*id.* at 1402).

The Fourth Circuit has also decided that an agency has no duty to negotiate over a bargaining proposal that would subject its contracting-out determinations made pursuant to the Circular to grievance and arbitration. In *HHS v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (en banc), the court concluded that arbitral review of such determinations would improperly "encroach on prerogatives reserved by law to agency management" (*id.* at 1088). With regard to the issues that were raised before the FLRA and the court of appeals in the present case, and that were raised before this Court in *EEOC SC*, 476 U.S. at 24, the Fourth Circuit majority determined¹⁴ that OMB Circular

¹⁴ Five judges dissented in *HHS v. FLRA*, arguing that the "applicable laws" and "law, rule, or regulation" issues were not properly before the court. 844 F.2d at 1100, 1101-1102.

No. A-76 is not an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2)(B). *HHS v. FLRA*, 844 F.2d at 1094-1096. The court reasoned that since the Circular is an internal Executive Branch "managerial tool," it does not confer on third parties any legally enforceable rights and obligations. 5 U.S.C. 7106(a)(2)(B). The court also determined (844 F.2d at 1096) that OMB Circular No. A-76 is not a "law, rule, or regulation" for purposes of the definition of "grievance" in 5 U.S.C. 7103(a)(9)(C)(ii). The Fourth Circuit, like the Ninth Circuit, thus rejected the view of the court below that contracting-out decisions made pursuant to the Circular would be subject to grievance and arbitration even in the absence of a negotiated provision to that effect in the collective bargaining agreement. *HHS v. FLRA*, 844 F.2d at 1097-1098.¹⁵

2. The conflict involves an issue of importance to the government; the decision below is incorrect, and unless reversed it threatens to impede the effective operation of the government.

a. The court of appeals' decision would have an important adverse effect on government operations. As this Court recognized in *FLRA v. Aberdeen Proving Ground*, Title VII reflects a careful legislative balancing of the "rights of federal employees to bargain collectively and the 'paramount public interest in the effective conduct of the public's business.'" 108 S. Ct. at 1262 (citation omitted);

¹⁵ The Fourth Circuit also held that the union's proposal, which would subject the agency's contracting-out determinations to grievance and arbitration, was rendered nonnegotiable by 5 U.S.C. 7117(a), since those dispute resolution procedures would be inconsistent with express provisions in the Circular itself. *HHS v. FLRA*, 844 F.2d at 1088, 1099.

Although the language of the union proposal in this case is not identical with that in *HHS v. FLRA*, the essential intent and effect of the two proposals is the same. See note 27, *infra*.

cf. 5 U.S.C. 7101(b). Section 7106, the management rights provision, is one of the primary means by which Congress sought to protect that paramount interest. See *National Federation of Federal Employees, Local 1745 v. FLRA*, 828 F.2d 834, 839 n.31 (D.C. Cir. 1987); cf. H.R. Rep. No. 1403, 95th Cong., 2d Sess. 43-44 (1978). By ignoring the plain terms of that provision and its place in the statutory scheme, the decision below has undermined that interest.

Section 7106 provides that "nothing in this chapter shall affect the authority of any management official of any agency * * * in accordance with applicable laws * * * to make determinations with respect to contracting out." As the court in *HHS v. FLRA* recognized, "[i]t would have been difficult, if not impossible, for Congress to choose more emphatic or comprehensive language in drafting the management rights clause." 844 F.2d at 1090. Moreover, in including within those management rights decisions about whether or not to contract out, Congress explicitly recognized that such decisions involve the exercise of the kind of managerial judgment that is most appropriately left to the informed discretion of responsible management officials.

The court below nevertheless required the agency to bargain over the union's proposal to subject agency contracting-out decisions made pursuant to OMB Circular No. A-76 to the collective bargaining agreement's grievance and arbitration provisions. Title VII provides that if the parties fail to reach agreement on a proposal subject to negotiation, either party may ask the Federal Service Impasses Panel to resolve the impasse, and that panel may put the union proposal into effect. In that event, the union could resort to the grievance procedures on any challenge to the propriety of management's contracting-out decisions and, if the parties were unable to settle their differences, require the agency to submit to

resolution of the dispute by an independent arbitrator. See pp. 6-7, *supra*. Accordingly, the decision below means that, despite the command of Section 7106, "determinations with respect to contracting out" would no longer be reserved to management officials. Instead, arbitrators, rather than agency managers, would become the ultimate authority on such matters.

To be sure, the FLRA has declared that, in adjudicating grievances alleging a violation of OMB Circular No. A-76, arbitrators are not permitted to review management's discretionary decisions, and are not allowed simply to substitute their judgment for that of agency management officials. *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and AFGE, Local 2840*, 22 F.L.R.A. 656, 661 (1986) [*Blytheville*]. "However, where the entire decisionmaking process is permeated with discretion, as it is under the Circular, that substitution would be inevitable." *HHS v. FLRA*, 844 F.2d at 1092.¹⁶ In any event, the question whether a

¹⁶ See also 844 F.2d at 1092-1094. Implementation of the Circular calls throughout for the exercise of managerial judgment. The Circular expressly provides, for example, that the threshold step in the contracting-out analysis—determining whether the activity is "governmental" or "commercial"—is to be made "us[ing] informed judgment." Circular, Attach. A n.1. Similarly, in determining the configuration of government employees and resources that will lead to the most efficient in-house performance (see *id.*, Supplement at I-12, IV-2), management is specifically directed by the Circular to use its "own management techniques." *Id.* at III-1. And even with respect to the actual cost comparison, the Circular makes clear that management's "informed judgment" is an essential ingredient of the decision-making process. *Id.* at IV-7. As the Ninth Circuit concluded, these and other determinations called for in the Circular "inevitably involve 'questions of judgment requiring close analysis and nice choices' which are properly committed to the informed discretion of management." *Defense Language Institute v. FLRA*, 767 F.2d at 1401 (quoting *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958)).

particular aspect of the Circular is or is not "discretionary" can itself be matter of judgment with respect to which an arbitrator might disagree with agency management officials. See *id.* at 1093.¹⁷ Accordingly, the constraints that the FLRA has attempted to impose upon arbitral review of contracting-out decisions are more theoretical than real: in passing upon a grievance alleging a violation of the Circular, an arbitrator would still have ample leeway "to substitute his own judgment on a discretionary matter for that of agency managers." *HHS v. FLRA*, 844 F.2d at 1093. And because review of arbitrators' rulings by the FLRA and by the courts is limited (5 U.S.C. 7122, 7123(a)(1)), management can have no assurance that an arbitral decision setting aside a proper managerial judgment will be corrected on review.¹⁸

Subjecting agencies' A-76 determinations to grievance and arbitration would also inject an unacceptable element

¹⁷ For example, although the FLRA upheld the arbitrator's determination in *Blytheville* itself, concluding that the challenged agency decision violated non-discretionary provisions of OMB Circular No. A-76, the errors identified turned largely on matters of discretion. The arbitrator faulted the agency for incorrectly estimating in-house labor costs, including the grade level required for a temporary employee to perform the work and the extent to which contracting out would displace existing employees. Compare *Blytheville*, 22 F.L.R.A. at 662, with *HHS v. FLRA*, 844 F.2d at 1093 (criticizing *Blytheville*).

¹⁸ As this Court has recognized, "the 'specialized competence of [labor] arbitrators pertains primarily to the law of the shop, not the law of the land.'" *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743 (1981) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974)). Accordingly, labor arbitrators' decisions, in seeking to effect a compromise, may not take sufficient account of pertinent public law considerations. *Barrentine*, 450 U.S. at 743; cf. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960). See generally Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482 (1959); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955).

of uncertainty and delay into the government's contracting-out activity. As the court of appeals acknowledged in this very case, the process of grievance and arbitration may take months, or even years, to run its course. App., *infra*, 7a. Accord *HHS v. FLRA*, 844 F.2d at 1094. And the FLRA has specifically held that although an arbitrator, upon determining that an agency's decision to contract out is in violation of the Circular, may not order outright cancellation of a contract, he may order the agency to "reconstruct" the procurement action by which outside services were obtained. *Blytheville*, 22 F.L.R.A. at 661.¹⁹ Thus, under the scenario contemplated by the FLRA, long after an agency has decided to contract work out and has accordingly entered into, and perhaps even completed, a contract with a private entity, the agency may be told by an arbitrator that the contracting-out decision must be reconsidered under the conditions that existed when it was made.

That prospect is not conducive to efficient agency management for a number of reasons. First, the problems inherent in attempting to reconstruct the earlier conditions might lead prudent agency managers to put off imple-

¹⁹ The FLRA explained the reconstruction process as follows (22 F.L.R.A. at 662):

An agency in taking the action required by [a reconstruction] award must reconstruct the procurement process in accordance with the provisions which were previously not complied with and must determine on reconstruction whether the decision to contract out is now in accord with law and regulation. If the decision to contract out can no longer be justified, the agency must determine whether considerations of cost, performance, and disruption override cancelling the procurement action and take whatever action is appropriate on the basis of that determination.

The agency's reconstruction, and its determination of the appropriate course in light of that reconstruction, might itself be subjected to Title VII grievance and arbitration procedures.

menting a contract pending the exhaustion of any grievance and arbitration proceedings.²⁰ But a delay to avoid the difficulties of reconstruction could itself lead to substantial inefficiencies, since "undue delay in implementing a contract award * * * may, because of rapidly changing economic conditions, invalidate the original cost comparison." Ketler, *Federal Employee Challenges to Contracting Out: Is there a Viable Forum?*, 111 Military L. Rev. 103, 117 (1986).²¹ Even if the initial cost comparison is still valid when the arbitrator eventually upholds the agency decision, the agency will have been deterred—perhaps at substantial cost to the government—from implementing an efficient contracting-out decision during the pendency of the arbitration proceeding. As the dissent pointed out in *EEOC CA*, 744 F.2d at 860:

[E]ven if the grievance is eventually denied, and that denial is affirmed [by the FLRA], the prolonged litigation will have cast a cloud over the agency's contracting out decision, subjected the decision to considerable delay, and wasted valuable agency assets on

²⁰ The court of appeals' refusal in this case to require negotiation about a union proposal to include a specific stay provision requirement in the collective bargaining agreement (see note 12, *supra*) does not eliminate the problem. Even in the absence of such a provision, management might choose to delay, rather than to go ahead with a contract only to be ordered, after the fact, to reconstruct the procurement action.

²¹ The determination of the relative cost of in-house performance as compared to the cost of contracting out turns on economic factors that may rapidly become outdated; thus, where a contracting-out determination is challenged and goes to arbitration, the cost comparison on which the determination was initially based may be inaccurate by the time the arbitrator finally reaches a decision.

an essentially frivolous claim. This extraordinary potential for vexatious litigation will significantly infringe upon management's specifically designated right to make contracting-out decisions.

In addition, the uncertainties attending the contracting-out process would adversely affect negotiations for goods and services. Potential bidders would realize that if they were initially awarded a contract, performance of the contract might not begin until long after the initial award, and that, if begun, performance might be interrupted in mid-stream. Bidders might well adjust their bids to account for these possibilities, thus increasing the ultimate contract cost to the government. *HHS v. FLRA*, 844 F.2d at 1094.²²

These prospects of delay and uncertainty stand in sharp contrast to the expedited internal appeals process contemplated by the Circular, pursuant to which an appeal ordinarily must be filed within 15 working days of the agency's initial decision, and must then be conclusively resolved by the agency itself within 30 calendar days. OMB Circular No. A-76, Supplement at I-14, I-15.

b. There is no valid ground for refusing to apply the management rights provision in this case.

Section 7106(a)(2) preserves agency authority, unhampered by any of the provisions of Title VII, to make determinations with respect to contracting out "in accordance with applicable laws." That qualification does not require compliance with OMB Circular No. A-76, nor does it authorize the union to enforce such compliance through Title VII grievance and arbitration machinery. As Justice

²² And, of course, these prospects might also lead some potential bidders to decide not to submit a bid at all.

Stevens recognized in dissenting from the dismissal of the writ of certiorari in *EEOC SC*, 476 U.S. at 27, "Circular A-76 is not one of the 'applicable laws' described in 5 U.S.C. § 7106(a)(2)(B)". See also *HHS v. FLRA*, 844 F.2d at 1094-1096. OMB Circular No. A-76, is clearly designed solely as a statement of intra-governmental policy.²³ Indeed, the Circular itself so states, Circular para. 1, and does not "establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular." *Id.*, para. 7.c(8).²⁴

²³ "In carrying out its responsibilities, the Office of Management and Budget issues policy guidelines to Federal agencies to promote efficiency and uniformity in Government activities. These guidelines are normally in the form of circulars." 5 C.F.R. 1310.1. See generally *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (discussing OMB Circular No. A-107).

²⁴ For this reason, and because, as the Fourth Circuit recognized, the "entire decisionmaking process [under the Circular] is permeated with discretion" (*HHS v. FLRA*, 844 F.2d at 1092 (see note 17, *supra*)), the courts that have considered the issue have consistently recognized that contracting-out decisions made pursuant to the Circular are not subject to judicial review. *AFGE, Local 2017 v. Brown*, 680 F.2d 722, 726 (11th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); *National Maritime Union v. Commander, Military Sealift Command*, 632 F. Supp. 409, 417 (D.D.C. 1986) (OMB Circular No. A-76 "provides no judicially enforceable substantive rights"), *aff'd*, 824 F.2d 1228 (D.C. Cir. 1987).

Just as "compliance" with the Circular is not amenable to judicial oversight, it is also not amenable to arbitrators' oversight: "[B]ecause the Circular lacks meaningful standards to guide management's discretion, [an arbitrator's and] the Authority's review would confront the same difficulty that has led courts to hold that judicial review of an agency's contracting-out determination [under A-76] is unavailable." *Defense Language Institute v. FLRA*, 767 F.2d at 1401; *HHS v. FLRA*, 844 F.2d at 1096.

The position of the court below has the counter-productive effect of "transform[ing] basic tools of management into an occasion for intrusion." *HHS v. FLRA*, 844 F.2d at 1100. Absent the Circular, unions plainly could not demand negotiation regarding the substance of agency decisionmaking in the area of contracting out, since the area is one that Congress has specifically reserved to management's discretion. See, e.g., H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 154 (1978) ("section 7106(a)(2)(B) requires the agency to retain the right to make determinations with respect to contracting out work"); 124 Cong. Rec. 24,286 (1978) (remarks of Rep. Clay) ("a labor organization cannot bargain with agencies over * * * contracting out"). It makes no sense to conclude that simply because the President²⁵ has chosen to provide his subordinates with written guidance on how to exercise that reserved discretion, this guidance is an "applicable law[]" giving rise to a right to union (and ultimately arbitral) involvement in the substantive decisionmaking process. As the Fourth Circuit has recognized, that interpretation of the management rights provision presents Executive officials "with the Hobson's choice of surrendering control over the interpretation of policy directives or attempting to manage without such instructions to subordinates." *HHS v. FLRA*, 844 F.2d at 1100.²⁶ Congress, in the course of enacting a statute that specifically preserves management's authority "to make

²⁵ OMB is an office within the Executive Office of the President (31 U.S.C. 501), and serves as "the President's principal arm for the exercise of his managerial functions" (31 U.S.C. 501 note).

²⁶ It is this aspect of the decision below that reaches beyond the provisions of Circular No. A-76, and implicates the entire process of developing government-wide guidelines to promote efficiency and uniformity in government activities. Cf. *Ketler, supra*, 111 Military L. Rev. at 139-140.

determinations with respect to contracting out" (5 U.S.C. 7106(a)(2)(B)), could scarcely have contemplated such a profoundly skewed result.²⁷

The FLRA's position rests in part on the belief that bargaining proposals like the one at issue in this case do not "affect the authority of any management official of any agency" (5 U.S.C. 7106(a)) because unions would be able to pursue grievance and arbitration to challenge agencies' A-76 determinations even in the absence of a negotiated contract provision to that effect. This belief—that the union's proposal is innocuous and unnecessary—is based on an untenable interpretation of the statutory scheme.²⁸ It makes no sense to say that Congress in the management rights provision carefully preserved management's authority "to make determinations with respect to contracting out," but that, at the same time, Congress intended that third-party labor arbitrators

²⁷ It is no answer to suggest, as did the court in *EEOC CA*, 744 F.2d at 848 (but not the FLRA in the instant case), that because procedures used in the exercise of management rights may be negotiable under 5 U.S.C. 7106(b), agency compliance with the Circular is negotiable. As the court explained in *HHS v. FLRA*, 844 F.2d at 1096-1097, while "[t]here can be no doubt that Circular A-76 is, to some extent, procedural" (*id.* at 1097), the effect of implementing the union proposal in that case would have extended far beyond procedure, and would have directly affected substantive rights. The same is true of the proposal at issue in the instant case, which would superimpose the collective bargaining agreement's grievance and third-party arbitration provisions on the Circular's existing internal appeal mechanism.

²⁸ The position also flouts common sense; it means that the union has advanced a bargaining proposal that has no practical effect at all, but is simply "a total nullity." *EEOC CA*, 744 F.2d at 852 (MacKinnon, J., dissenting). See *Defense Language Institute v. FLRA*, 767 F.2d at 1402 ("we find it incredible that the parties would so strenuously dispute a proposal that gives the union nothing it did not already possess and deprives management of nothing it had not already lost"); *HHS v. FLRA*, 844 F.2d at 1097 (same).

would, in settling grievances, oversee managers' contracting-out decisions made pursuant to Executive Branch discretionary policy.²⁹

Agency A-76 determinations are not subject to grievance and arbitration for the additional reason that they do not, in any event, come within the definition of a "grievance" in 5 U.S.C. 7103(a)(9). Complaints alleging that an agency has failed to comply with the Circular in making contracting-out determinations do not involve "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" (5 U.S.C. 7103(a)(9)(C)(ii)). Just as the Circular is not an "applicable law[]" within the meaning of Section 7106, it is not a "law, rule, or regulation" within the meaning of Section 7103(a)(9)(C)(ii): neither term includes internal guidelines for the implementation of Executive Branch policies, which serve to guide the exercise of managerial discretion but which have no "legal force" (*Schweiker v. Hansen*, 450 U.S. 785, 789 (1981)).

Finally, creation of a right to submit disputes over the application of the Circular to independent arbitration is inconsistent with the express terms of the Circular itself.³⁰ Under Title VII, the duty to bargain in good faith exists only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulations"; it does not extend to "matters which are the subject of any * * * Government-wide rule or regulation" (5 U.S.C. 7117(a)(1)).

²⁹ As the court observed in *HHS v. FLRA*, 844 F.2d at 1098 (citation omitted):

To read the statute this way is to read it to say 'nothing in this chapter, *except all the other provisions of this chapter, including § 7121*, shall affect [management] authority . . . to make determinations with respect to contracting out.'

³⁰ See OMB Circular No. A-76, Supplement at I-15 ("the procedure and the decision upon [intra-agency] appeal may not be subject to negotiation, arbitration, or agreement").

In light of this Section, whether or not OMB Circular No. A-76—which clearly applies generally throughout the government—is a Section 7103(a)(9)(C)(ii) “rule, or regulation affecting to conditions of employment,” there is no duty to bargain over proposals, like the one at issue here, that are flatly inconsistent with it. The D.C. Circuit was therefore incorrect in concluding in *EEOC CA*, 744 F.2d at 851, that “the Circular’s restrictive language cannot be construed to limit the statutory right to file grievances asserting a violation of contracting-out regulations.” The purpose of Section 7117(a)(1) is precisely to allow for such a limitation.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JUNE 1989

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

No. 87-1439

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE
SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT,

and

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

Argued April 18, 1988

Decided Dec. 2, 1988

Order Denying Rehearing En Banc
Feb. 28, 1989

Before MIKVA and D. H. GINSBURG, Circuit Judges and
JACKSON,* District Judge.

Opinion for the Court filed by District Judge JACKSON.
Opinion concurring and dissenting in part filed by
Circuit Judge D.H. GINSBURG.

JACKSON, District Judge:

We are again presented with a controversy between a federal agency and a union representing its employees as to whether they must bargain over the agency’s power to contract for the goods and services it needs from the private sector. The Internal Revenue Service (“IRS”),

** Sitting by designation pursuant to 28 U.S.C. § 292(a).

petitioner, insists that "contracting-out" is an exclusive management prerogative and, thus, not a proper subject for negotiation in the course of collective bargaining. Intervenor National Treasury Employees Union ("NTEU" or "Union"), which represents IRS' non-management employees, precipitated this particular dispute with two proposals it demanded the parties address in supplemental negotiations under their master agreement in September, 1986. Respondent Federal Labor Relations Authority ("FLRA") sided with the Union when the issue reached it in June 1987, and directed the IRS to bargain with NTEU over the proposals. IRS now petitions to set aside FLRA's decision. FLRA and the Union cross-petition to enforce it. We enforce the order of the FLRA as to the first of the proposals, and set it aside as to the second.

The case resumes an unresolved conflict between labor and management throughout the government generally as to the relationship between a document first promulgated by the Office of Management and Budget ("OMB") in 1966 (later revised), known as "Circular No. A-76" (the "Circular"), and various provisions of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7101 *et seq.* ("CSRA" or the "Act"). The Circular declares it to be the "general policy" of the government to rely on "commercial sources" to supply products and services necessary to its operation, *id.*, para. 4.a., and, to that end, admonishes that agencies are not to "start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source." *Id.*¹ A "Supplement" to the Circular

¹ A "commercial" product or service is to be distinguished from those generated in the course of "governmental" functions or activities, i.e., those functions or activities "so intimately related to the public interest as to mandate performance by Government employees." Circular, para. 6.

prescribes methods for calculating the differential between "in-house" and "contract-out" procurements, Supplement, Part IV, and directs each agency to establish an "administrative appeals procedure" to resolve questions from "directly affected parties" relating to "cost comparisons" expeditiously, and, in any event within 30 days. *Id.*, Part I, Ch. 2, para. 1. The Circular itself continues to state that in-house procurements are "authorized" only if a cost comparison demonstrates that the government can provide what is needed more cheaply than a "qualified commercial source" on an "ongoing basis." Circular, para. 8.d.

Government employees may of course, by "directly affected" by their agency's decisions to look elsewhere for products or services the employees themselves might conceivably furnish. Nevertheless, one provision of the CSRA, spoken of as the "management rights clause" expressly confirms the authority of the agency's "management officials" to, *inter alia*, "make determinations with respect to contracting out." 5 U.S.C. § 7106(a)(2)(B). Elsewhere, however, the CSRA requires agencies to bargain collectively, and in good faith, with federal employee unions over "conditions of employment," including "policies, practices, and matters . . . affecting working conditions." 5 U.S.C. §§ 7103(a)(12), 7114(a)(4), 7117, 7106(b).

NTEU proffered two "proposals" (among others) to IRS as fit subjects for bargaining: the first would establish the "grievance and arbitration" provisions of the master labor agreement between them as the internal "administrative appeals procedure" mandated by the Supplement to the Circular for disputed "contracting-out" cases; the second would provide that no outside contract be awarded "until all grievance procedures, up to and in-

cluding arbitration" had been exhausted. The IRS demurred. The proposals, it said, were non-negotiable, because they purported to place an exclusive management prerogative at hazard in the collective bargaining process. The Union appealed to the FLRA pursuant to 5 U.S.C. § 7105(a)(2)(E) which found both proposals negotiable, and the IRS appealed to us.

A similar proposal by a federal employees' union to subject an agency's decisions to contract out in accordance with the Circular to the collective bargaining process has been before us in the past, and we find this case to be governed by that precedent. In *EEOC v. Federal Labor Relations Authority*, 744 F.2d 842 (D.C.Cir. 1984), cert. dismissed, 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986), the Equal Employment Opportunity Commission ("EEOC") had refused to bargain with the American Federation of Government Employees over its proposal that would have rendered the EEOC's decision to contract-out grievable.² The FLRA rejected substantially the same management-prerogative position espoused by the IRS here, and required the EEOC to bargain over the proposal, and the agency appealed. We affirmed the FLRA, holding that the proposal would not impair management's statutorily reserved right to contract out; it merely rendered the grievance procedure the mechanism by which

² The union's proposal in *EEOC* was simply that the agency agree to "comply" with the Circular "and other applicable laws and regulations concerning contracting-out." The agency presumably intended to comply with the Circular of its own volition, but objected to including a commitment to do so in its collective bargaining agreement because, *inter alia*, it believed its contracting-out decisions would then become grievable where they had not been before.

union members could make their displeasure with a decision to do so known and ask for relief. The court said:

A grievance alleging noncompliance with the Circular . . . does not affect management's substantive authority, within the meaning of the statutory language, to contract-out. Rather, it provides a procedure for enforcing the Act's requirement that contracting-out decisions be made in accordance with applicable laws. . . . We therefore find that a grievance asserting that management failed to comply with its statutory or regulatory parameters in making a contracting-out decision is not precluded by the management rights clause.

Id. at 850-51.

The *EEOC* court was assuming, however, without considering or deciding, that the Circular was either an "applicable law," with which all contracting-out decisions must, by statute, accord, 5 U.S.C. § 7106(a)(2)(B), or it was a "law, rule or regulation" a failure to comply with which would, again by statute, give rise to a grievance if it were to affect "conditions of employment." 5 U.S.C. § 7103(a)(9)(C)(ii). The Supreme Court subsequently dismissed a writ of certiorari, issued upon EEOC's petition, as having been improvidently granted, 476 U.S.C. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986), when the EEOC attempted to argue that the Circular was none of the foregoing, arguments it had never made before either the FLRA or this court. Those arguments have now been borrowed by the IRS, and are now before us (as they were this time also before the FLRA) as reason to conclude that *EEOC v. FLRA* is distinguishable, or was wrongly decided.

We do not, however, find an intellectually legitimate basis to distinguish *EEOC* from this case. The new argu-

ments are merely that; they suggest alternative reasons why the "management rights" provisions of Section 7106 should be read to preclude employee grievances with respect to an agency's decision to contract-out. The holding of *EEOC* is, however, expressly to the contrary. Any distinction we might attempt to predicate on the difference in wording of the AFGE's proposal in *EEOC* and NTEU's first proposal here would be illusory. The essence of the controversy is the same, as to which *EEOC* has unequivocally held contracting-out decisions to be both grievable and, perforce, bargainable.

The new arguments have, however, persuaded the Ninth Circuit, see *Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir.1985), cert. dismissed, 476 U.S. 1110, 106 S.Ct. 2004, 90 L.Ed.2d 647 (1986), and more recently, the Fourth Circuit, *U.S. Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir.1988) (*en banc*) that *EEOC* was wrongly decided. That option, however, is not open to us. The doctrine of *stare decisis* "demands that we abide by a recent decision of one panel of this court unless the panel has withdrawn the opinion or the court *en banc* has overruled it." *Brewster v. Comm'r of Internal Revenue*, 607 F.2d 1369, 1373 (D.C.Cir.1979). Accordingly, we affirm the FLRA as to NTEU's first proposal, and enforce its order that the IRS and NTEU bargain over its inclusion in their master labor agreement.

We are not, however, so constrained with respect to NTEU's second proposal. No other court appears to have addressed its like. Perhaps no other union has been so bold as to suggest it. We conclude that it encroaches entirely too far upon management's authority to accomplish its agency's mission with dispatch, whether or not, as the Fourth Circuit concluded in *HHS v. FLRA*, binding arbitration of itself imports the substitution of arbitral judg-

ment for that of management as to the circumstances in which the agency should contract-out.

The second proposal, quite simply, would oblige the agency to await an arbitrator's decision before going forward with a private sector procurement, and, as the Fourth Circuit observed, arbitrations of grievances under collective bargaining agreements can take years to resolve. 844 F.2d at 1099. It matters not whether the arbitrator ultimately approves or disapproves management's decision to contract-out (and leaving aside difficult questions as to his authority to affect the decision in any way in fashioning a remedy for aggrieved employees), the delay alone could compromise the managerial judgment involved in procuring products or services necessary to the agency's mission when they are needed.

We have recently held non-negotiable a proposal to delay implementation for six months of a new U.S. Customs Service program to grant vessels arriving from abroad conditional permission to enter U.S. ports while the union makes a study of the program's impact on bargaining unit employees. *United States Customs Service v. FLRA*, 854 F.2d 1414 (D.C.Cir.1988). The proposal, we said, "is not directed at *how* the agency will implement its program; it would serve rather to place on the bargaining table the agency's decision as to *when* to implement its new program," a matter which "is part and parcel of the reserved management right to determine the means by which an agency's work will be performed." *Id.* at 1419. (Emphasis in original).

The same reasoning obtains with respect to management decisions of an agency to contract for goods or services outside the federal workplace. We therefore reverse the decision of the FLRA holding NTEU's second proposal bargainable.

It is so ordered.

D.H. GINSBURG, Circuit Judge, concurring and dissenting:

I agree with the court that NTEU's proposal that no outside contracts be awarded prior to exhaustion of all grievance procedures is non-negotiable. I do not agree, however, that our decision in *EEOC v. FLRA*, 744 F.2d 842 (D.C.Cir.1984), *cert. granted*, 472 U.S. 1026, 105 S.Ct. 3497, 87 L.Ed.2d 629 (1985), *cert. vacated*, 476 U.S. 19, 106 S.Ct. 1678, 90 L.Ed.2d 19 (1986), "govern[s]" this case so as to preclude our reaching the merits of the IRS's arguments that, because the Circular was neither an "applicable law" under 5 U.S.C. § 7106(a)(2)(B) nor a "law, rule, or regulation" under 5 U.S.C. § 7103(a)(9)(C)(ii), NTEU's proposal to make contracting-out decisions subject to grievance procedures is non-negotiable as well.

As the court points out in *EEOC* we were "*assuming, without considering or deciding*, that the Circular was either an 'applicable law' . . . or . . . a 'law, rule, or regulation.'" Opinion at 882 (emphasis added); *EEOC*, 744 F.2d at 848, 850. As the court candidly states, the question of the Circular's legal status was "never [argued] before either the FLRA or this court." Opinion at 882. Indeed, the Supreme Court, noting the agency's failure "to raise [these claims] at any point in the Court of Appeals," *EEOC v. FLRA*, 476 U.S. 19, 106 S.Ct. 1678, 1681, 90 L.Ed.2d 19 (1986), concluded that this court was "without jurisdiction to consider" the issue. *Id.*, 106 S.Ct. at 1680.

Nevertheless, the court today holds that our previous decision resolved this issue, foreclosing us from considering it now. Granted that "new arguments are merely that," Opinion at 882; they are also arguments on which this court has not yet ruled. Thus, the court errs today insofar as it interprets the IRS to be arguing "that *EEOC v. FLRA*

is distinguishable, or was wrongly decided." *Id.* The IRS makes no such argument. Because the earlier case did not decide the issue, there is no need for us to distinguish it, much less to overrule it; the prior case is simply irrelevant to the argument being made to us today.

If what the court does today, in merely a few strokes of the pen, were incorporated into our system of *stare decisis*, then the words, "We assume without deciding" and "We need not reach the question" would have no meaning. Whenever this court assumed a proposition for the purposes of argument, it would actually be deciding the issue it purported to reserve, and absent rehearing *en banc*, subsequent panels would be bound by its "decision."

Furthermore, whenever a party to any proceeding before this court failed to raise before the agency or the district court any argument that it could have raised there, that argument would be unavailable not only to the party before this court, as it should be, but also to *any* later litigant, the issue having already been "decided." This is obviously not the law of issue preclusion as we know it.

In my view, therefore, we have no choice but to reach the merits of the IRS's claim. We need not tarry long over it, however; the pros and cons have already been fully and ably spread upon the pages of the Federal Reporter by the Fourth Circuit, sitting *en banc*. *U.S. Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir.1988) (*HHS*). See also *Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir.1985). I am persuaded by Judge Wilkinson's detailed and thoughtful opinion for the court in *HHS* and would rule, consistent therewith, that the Circular is neither an "applicable law" nor a "law, rule, or regulation" and that NTEU's proposal to subject contracting-out decisions to grievance procedures is therefore non-negotiable.

Accordingly, I concur in part and dissent in part.

APPENDIX B

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.**

Case No. O-NG-1350

NATIONAL TREASURY EMPLOYEES UNION, UNION

and

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE
SERVICE, AGENCY

DECISION AND ORDER ON NEGOTIABILITY ISSUES

I. Statement of the Case

This case is before the Authority because of a negotiability appeal filed under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of two Union proposals.

II. Proposal 1

The Internal Appeals Procedure shall be the parties' grievance and arbitration provisions of the Master Agreements.

A. Positions of the Parties

The Agency contends that Proposal 1 is nonnegotiable under section 7117(a)(1) of the Statute because it is inconsistent with OMB Circular A-76, a Government-wide rule or regulation. The Agency argues that the proposal conflicts with OMB Circular A-76 because it would

broaden the scope of permissible challenges to contracting-out actions under the regulation and would replace the forum where such challenges can be heard under the regulation with the negotiated grievance procedure. The Agency also contends that Proposal 1 is inconsistent with management's right to contract out under section 7106(a)(2)(B) of the Statute. It argues that the grievance procedure established by the Statute may not be used to challenge the exercise of management's reserved right to contract out.

The Union contends that Proposal 1 is not barred by a Government-wide regulation. The Union also states that Proposal 1 requires the Agency to use the parties' negotiated grievance procedure as the mechanism for resolving all grievable disputes concerning OMB Circular A-76. The Union contends that Proposal 1 in no way encompasses or establishes a right for the Union to grieve the substance of the Agency's decision to contract out. It asserts that the proposal merely seeks to enforce conformity with applicable law, regulations and the procedural processes established by policy or practice and therefore does not violate management's rights.

B. Analysis

1. Proposal 1 is Not Inconsistent with a Government-Wide Rule or Regulation

Contrary to the Union, and for reasons stated more fully in *American Federation of Government Employees, Local 225, AFL-CIO and Department of the Army, U.S. Army Armament Research and Development Command, Dover, New Jersey*, 17 FLRA 417, 420 (1985), we find that OMB Circular A-76 constitutes a Government-wide rule or regulation within the meaning of section 7117(a)(1) of the Statute. As to whether Proposal 1 is inconsistent with

the Circular, in *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission*, 10 FLRA 3 (1982) (Proposal 1), *enforced sub nom. EEOC v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984), *cert dismissed*, 106 S.Ct. 1678 (1986) (per curiam), the Authority considered and rejected arguments similar to those asserted by the Agency in this case. The Authority found that the right to file grievances concerning contracting-out decisions which affect conditions of employment is created by the Statute. The Authority therefore held that the Circular cannot limit the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure. See *EEOC*, 10 FLRA at 4, *American Federation of Government Employees, AFL-CIO, Local 1923 and Department of Health and Human Services, Office of the Secretary, Office of the General Counsel, Baltimore, Maryland*, 22 FLRA No. 106 (1986), *enforced sub nom. U.S. Department of Health and Human Services v. FLRA*, No. 86-2619 (4th Cir. June 23, 1987). See also *EEOC v. FLRA*, 744 F.2d at 851-52; *DHHS v. FLRA*, No. 86-2619, slip op. at 21-23. Similarly, for the reasons stated in *EEOC* and *DHHS*, *Office of the Secretary*, we reject the Agency's argument in this case and find that Proposal 1 is not inconsistent with OMB Circular A-76.

2. Proposal 1 is Not Inconsistent with Law

The Agency states three grounds for its contention that matters pertaining to contracting-out under OMB Circular A-76 are not subject to the negotiated grievance procedure. First, the Agency argues that OMB Circular A-76 is an internal policy directive and not a law, rule or regulation "within the normal meaning." Agency Statement of Position at 6. The Agency contends that there can be no "grievance" within the meaning of section 7103(a)(9) on a

violation, misinterpretation or misapplication of the Circular since the Circular is not a law, rule, or regulation. We reject the Agency's argument for the reason we rejected the Union's similar argument above. See Section II, B.1 of this decision. OMB Circular A-76 is a Government-wide rule or regulation and grievances concerning its interpretation and application fall within the statutorily prescribed scope and coverage of the parties' negotiated grievance procedure.

Second, the Agency contends that even if OMB Circular A-76 is a Government-wide regulation, contracting-out does not concern employees' conditions of employment and therefore is not a matter which is subject to the grievance procedure. This argument must also be rejected. An Agency's contracting-out determination has the potential for affecting employees' working conditions even to the extent of costing employees their jobs. The potential loss of employment due to a decision to contract out bargaining unit work, or a decision to reassign or reallocate the duties and functions of bargaining unit positions, at a minimum, affects the conditions of employment of the employees who perform those duties and functions.

Lastly, the Agency contends that the exercise of management's right to contract out is not subject to the grievance procedure. The Agency's arguments in this case are essentially the same as those rejected by the Authority in finding similar proposals negotiable in *DHHS, Office of the Secretary*, 22 FLRA No. 106 and *EEOC*, 10 FLRA 3. In those cases the Authority held that proposals which required management to comply with applicable laws and regulations, including specifically OMB Circular A-76, in exercising its right to make contracting-out determinations did not directly interfere with section 7106(a)(2)(B) of the Statute because the proposals would only contractually recognize external limitations on management's right. The

Authority found that the proposals themselves would not establish any particular substantive limitation on management in the exercise of that right. *See also EEOC v. FLRA*, 744 F.2d at 848-49, *DHHS v. FLRA*, no. 86-2619, slip op. at 6-21.¹ The Authority also specifically rejected in those cases the agencies' assertion that contractual provisions which subject management's contracting-out decisions to any type of grievance or arbitral review are non-negotiable. *See DHHS, Office of the Secretary*, 22 FLRA No. 106, slip op. at 3.

Proposal 1 in this case would allow the Union to grieve matters arising out of the Agency's decision to contract out, where those matters concern an alleged failure to comply with applicable laws, regulations and established procedural processes. Union's Response to Agency's Statement of Position at 3. The Authority has found that the Statute requires grievance procedures negotiated under section 7121 of the Statute to cover all matters that under the provisions of law could be submitted to the grievance procedure, unless the parties exclude them through bargaining. *See DHHS, Office of the Secretary*, 22 FLRA No. 106, slip op. at 3-4; *EEOC v. FLRA*, 774 F.2d at 849-51; *DHHS v. FLRA*, No. 86-2619, slip op. at 15-21. A proposal which would allow the Union to grieve matters arising from an agency's contracting-out determining on the basis that they are not in compliance with law and regulation would not, therefore, change the statutorily

¹ Compare *Defense Language Institute, Presidio of Monterey, California v. FLRA*, 767 F.2d 1398 (9th Cir. 1985), denying enforcement of *National Federation of Federal Employees, Local 1263 and Defense Language Institute, Presidio of California*, 14 FLRA 761 (1984). The U.S. Court of Appeals for the Ninth Circuit, in that case, rejected the Authority's approach in *EEOC*, 10 FLRA 3 (1982). We, however, respectfully adhere to the view that the Authority's position in *EEOC* is correct.

prescribed scope and coverage of the parties' negotiated grievance procedure. Disputes involving conditions of employment arising from the application of OMB Circular A-76 would be covered by the negotiated grievance procedure, even in the absence of such a contractual provision. *Id.* Moreover, such grievances require nothing that is not required by section 7106(a)(2) of the Statute itself, namely, that determinations as to contracting-out must be made "in accordance with applicable laws[.]"

For the reasons set forth in *EEOC* and *DHHS, Office of the Secretary*, we conclude that Proposal 1, which allows grievances asserting that management failed to act within applicable statutory or regulatory parameters in making a contracting-out decision, does not directly interfere with management's right under section 7106(a)(2)(B) of the Statute. The proposal would only contractually recognize and provide for the enforcement of external limitations on management's right. The proposal would not itself establish any particular substantive limitation on management in the exercise of its right to make contracting-out determinations. *See National Federation of Federal Employees, Local 1374 and Pacific Missile Test Center*, 24 FLRA No. 9 (1986) (grievance claiming that a procurement action failed to comply with procurement law and regulation is within the broad scope of the grievance procedure prescribed by the Statute and is not precluded by law or regulation, including management's right under section 7106(a)(2)(B) to make determinations with respect to contracting-out).

C. Conclusion

Based on the parties' explanation of the proposal and the Authority's decisions in *DHHS, Office of the Secretary* and *EEOC*, we find that Proposal 1 is within the duty to bargain.

III. Proposal 2

a. No contract award shall be made until all grievance procedures, up to and including arbitration, are exhausted in regard to any contract provision pertaining to the impact and implementation of a contracting-out decision.

b. No contract award shall be made until all grievance procedures, up to and including arbitration, are exhausted in regard to any provisions (e.g. OMB Circular A-76, Statute) pertaining to the impact and implementation of a contracting-out decision.

A. Positions of the Parties

The Agency contends that Proposal 2 impairs the Agency's ability to contract out to such an extent that it amounts to a substantive interference with management's right, and therefore is not a negotiable procedure under section 7106(b)(2) of the Statute. The Agency also argues that Proposal 2 is not an appropriate arrangement for employees adversely affected by the exercise of a management right because it excessively interferes with management's right to contract out.

The Union asserts that Proposal 2 merely delays implementation of the Agency's contracting-out determination while procedural compliance is challenged.

B. Analysis

Proposal 2 provides that the Agency shall wait until all grievances concerning the impact and implementation of a contracting-out determination have been exhausted through the grievance and arbitration procedures before awarding any contract.

The Authority has held that proposals to stay final agency action pending the outcome of the grievance procedure are negotiable procedures under section 7106(b)(2)

of the Statute. See *American Federation of Government Employees, AFL-CIO, Council 214 and Department of the Air Force, Logistics Command, Wright-Patterson Air Force Base, Ohio*, 21 FLRA No. 34 (1986) (Proposal 2) (proposal to delay disciplinary action, or a collection act, until final resolution of an employee's grievance involves a negotiable procedure). See also *Federal Union of Scientists and Engineers, National Association of Government Employees, Local R1-144, SEIU, AFL-CIO and U.S. Department of the Navy, Naval Underwater Systems Center*, 25 FLRA No. 79 (1987) (first sentence of Proposal 2) (proposal to stay RIF action pending settlement of related appeals is negotiable). Therefore, for the reasons stated more fully in *Wright-Patterson AFB and Naval Underwater Systems Center*, we find that Proposal 2 is within the duty to bargain. See also *American Federation of Government Employees, AFL-CIO, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan*, 14 FLRA 302, 304-5 (1984).

The Agency claims that the implementation of Proposal 2 would preclude it from making contracting-out determinations within time limits prescribed by OMB Circular A-76. The Agency contends that delaying a contracting-out decision until challenges have been processed through the grievance and arbitration procedure would result in extending the decision to award a contract beyond those time limits and would thereby prevent it from making the decision. Both parties, however, note possible solutions to that problem, namely, an expedited grievance arbitration process or including provisions in bid solicitations that contracts will not be awarded until grievance arbitration procedures are completed. We conclude therefore that these considerations do not render the proposal nonnegotiable. Rather, the Agency's objection to the proposal on those grounds relates to the merits of the proposal.

C. Conclusion

Proposal 2 is a negotiable procedure under section 7106(b)(2) because it does not directly interfere with the Agency's rights under section 7106(a)(2)(B) of the Statute.

IV. Order

The Agency shall upon request, or as otherwise agreed to by the parties, bargain on Proposals 1 and 2.²

Issued, Washington, D.C., June 30, 1987.

/s/	<u>Jerry L. Calhoun</u>	
	JERRY L. CALHOUN,	Chairman
/s/	<u>Henry B. Frazier, III</u>	
	HENRY B. FRAZIER, III,	Member
/s/	<u>Jean McKee</u>	
	JEAN MCKEE,	Member
	FEDERAL LABOR RELATIONS AUTHORITY	

² In finding Proposals 1 and 2 to be negotiable, we express no opinion as to the proposals' merits.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1439

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE
SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT
NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

[Filed Dec. 2, 1988]

PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF THE FEDERAL LABOR
RELATIONS AUTHORITY

Before: MIKVA and D. H. GINSBURG, Circuit Judges and
JACKSON*, District Judge.

JUDGMENT

This cause came on to be heard on the petition for review and cross-application for enforcement of an order of the Federal Labor Relations Authority, and was argued by counsel. On consideration thereof, it is

*Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a).

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ORDERED and ADJUDGED, by the Court, that the petition for review and cross-application for enforcement are granted in part and denied in part, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

/s/ Constance L. Dupre
CONSTANCE L. DUPRE, Clerk

Date: December 2, 1988

Opinion for the Court filed by District Judge Jackson.
Opinion concurring and dissenting in part filed by Circuit Judge D. H. Ginsburg.

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APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 87-1439

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE
SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT
NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

[Filed Feb. 28, 1989]

Before: MIKVA and D. H. GINSBURG, Circuit Judges and
JACKSON, United States District Judge

ORDER

Upon consideration of petitioner's petition for rehearing it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:
CONSTANCE L. DUPRE, Clerk

BY: /s/ ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1439

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE
SERVICE, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT

and

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

[Filed Feb. 28, 1989]

On Petitioner's Suggestion for Rehearing *En Banc*

Before: WALD, *Chief Judge*, ROBINSON, MIKVA EDWARDS,
RUTH G. GINSBURG, STARR, SILBERMAN, BUCKLEY,
WILLIAMS, D.H. GINSBURG and SENTELLE, *Circuit
Judges*

ORDER

Petitioner's suggestion for rehearing *en banc* has been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE
Clerk

A concurring statement of *Circuit Judge* SILBERMAN is attached.

A concurring statement of *Circuit Judge* D. H. GINSBURG, joined by *Circuit Judges* WILLIAMS and SENTELLE, is also attached.

SILBERMAN, *Circuit Judge*, concurring in the denial of rehearing *en banc*: I think we should be exceedingly reluctant to agree to an *en banc* rehearing with two vacancies (as we will shortly have).

D.H. GINSBURG, *Circuit Judge*, with whom WILLIAMS and SENTELLE, *Circuit Judges*, join, concurring in the denial of rehearing *en banc*: I think it would be a poor use of our resources to rehear this matter *en banc*. Both the Fourth and the Ninth Circuits have decided, contrary to our panel, that OMB Circular A-76 is neither an "applicable law" under 5 U.S.C. § 7106(a)(2)(B) nor a "law, rule, or regulation" under 5 U.S.C. § 7103(a)(9)(C)(ii). *U.S. Department of Health and Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1988) (*en banc*); *Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir. 1985). It is likely that the Supreme Court will want to resolve this question, since it indicated its willingness to decide the same issue when it granted *certiorari*, 105 S. Ct. 3497 (1985), to review our decision in *EEOC v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984) even before there was a split in the circuits on this question. The Court vacated its grant of *cert.*, however, when it determined that the issue was not properly before it. 106 S. Ct. 1678 (1986).

In view of the Supreme Court's apparent interest in this issue, I do not conceive it to be a sensible allocation of our time to rehear this case *en banc*. If the Supreme Court, however, chooses not to resolve this question, I do not, by my concurrence today, suggest that I would oppose a request by the government that we consider this issue *en banc* in a subsequent case.